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Equal Protection – Florida’s Disenfranchisement Law: Appellate Court Affirms Decision Finding Disenfranchisement Provision Does Not Violate Constitution. *Johnson v. Governor of The State of Florida, Et Al.*, 405 F.3d 1214 (11th Cir. 2005)

Arthenia L. Joyner*

I. INTRODUCTION

What does it mean when we say someone has “paid his or her debt to society?” Most people equate this statement with the commercial event of extinguishing with finality a liability or obligation. Yet, somehow that same phrase carries a far different meaning in Florida jurisprudence.¹ Less than two decades after the landmark *Brown v. Board of Education*² decision, Florida re-drafted its constitution but did not disturb the antiquated provisions aimed at making certain citizens invisible to the political process.

In *Johnson v. Bush, et al.*,³ plaintiffs sued on behalf of all Florida citizens convicted of felonies who had completed all terms of incar-

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1. Florida is one of only five states (AL, FL, IA, KY, VA) that disenfranchise all ex-felons even after completion of punishment. United States disenfranchisement policies are harsh and deeply rooted in the legal framework of society. Florida’s provision has been enshrined in the state constitution since Reconstruction and, like all others, is based on the medieval times principle of “civil death” – the deprivation of all rights to people convicted of a felony. See Marc Mauer, *Felony Disenfranchisement: A Policy Whose Time Has Passed?*, HUMAN RIGHTS, 31 A.B.A. SEC. INDIVIDUAL RTS. RESP. 1.

2. 347 U.S. 483 (1954). *Author’s note: Brown I* held that segregated public schools (“separate, but equal”) were unconstitutional and a violation of the Fourteenth Amendment’s Equal Protection Clause. Presently, the struggle for equal protection under the law continues in the midst of recurring *de jure* disenfranchisement.

3. 214 F. Supp. 2d 1333 (S.D. Fla. 2002).

ceration or probation yet remained ineligible to vote.⁴ They alleged a myriad of United States Constitution and Code violations.⁵ The Southern District Court of Florida granted summary judgment in favor of the defendant (Clemency Board members). Among other holdings of the district court case discussed herein, this article will focus attention to the holding most adverse to the plaintiffs' principal assertion and to the subsequent effects – that "exclusion of ex-felons from [sic] voting did not violate Equal Protection or Due Process Clauses."⁶

Of particular importance are the future legal implications this controversial issue bears upon the law, relative to civil rights and concerning citizens who happen to be convicted felons. Considering felony disenfranchisement, the line between guaranteed constitutional protected franchise and sovereign governmental power to determine the coverage of those protected rights is, at best, tenuous. It seems the appellate order for rehearing, which vacated the preceding panel's opinion,⁷ thereby decreed that a comprehensive examination must be undertaken to determine whether the disenfranchisement provision in Florida's Constitution of 1968 "conformed to [the] Equal Protection Clause."⁸

II. EQUAL PROTECTION

Almost a century and one-half ago, Congress enacted a well-known addition to the United States Constitution prohibiting State laws that abridge any United States citizens' privileges or immunities.⁹ It further declares: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."¹⁰

How might Florida's constitutional provisions revoking the voting franchise of all persons convicted of a felony inflict no violence upon such clear Constitutional language, notwithstanding successful com-

4. *Id.* at 1335.

5. *Id.*

6. *Id.* at 1338. (citing Supreme Court' case *Richardson v. Ramirez*, 418 U.S. 24 (1974)).

7. *Johnson v. Governor of the State of Fla.*, 353 F.3d 1287 (11th Cir. 2003).

8. *Johnson v. Governor of the State of Fla.*, 377 F.3d 1163 (11th Cir. 2004) (which is the nucleus of this article. As such, the legal discussion contained herein is an analysis of the impact this case and related cases are making within the context of felony disenfranchisement jurisprudence and civil rights restoration).

9. U.S. CONST. amend. XIV § 1.

10. *Id.*

pletion by the ex-felons of all probation or terms of incarceration? An inquiry into the statutory derivation and history is illuminating.

*A. Florida Disenfranchisement Impact Compared
to the National Impact*

The current Florida constitutional disenfranchisement provision states “[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.”¹¹ A felony means “any criminal offense that is punishable under the laws of this state . . . by death or by imprisonment in the state penitentiary.”¹² Any person desirous of registering to vote in Florida must qualify based on requirements cited in the Florida Voter Registration Act.¹³ Most notably, felony convicts who have not had their rights to vote restored are summarily written out of the statute and categorized as unqualified registrants.¹⁴ Therefore, ex-convicts similarly situated to the *Johnson* plaintiffs must apply for civil rights restoration via executive clemency in order to meet the voting requirements.¹⁵ Considering the cumbersome and expensive nature of the clemency process, undoubtedly many applicants are deterred from the outset when faced with only the mere possibility that their civil rights will be restored.¹⁶

Historically, Florida’s law effectively disenfranchised an estimated 647,000 ex-felons, of which 204,000 are African-American men.¹⁷ In essence, more than thirty-one percent (31%) of the total esti-

11. FLA. CONST. art. VI § 4(a) (1968) (Disqualifications). The earliest constitution contained the original disenfranchisement provision, *See* FLA. CONST. art. VI, §§ 4, 13 (1838). Thereafter, the constitution was re-drafted four times (1861, 1865, 1868, and 1885) before the current version was enacted. However, the disenfranchisement provision remains essentially intact.

12. FLA. CONST. art. X § 10.

13. FLA. STAT. § 97.041.

14. § 97.041(2)(b).

15. FLA. STAT. § 940.03. Interestingly the statute *may require* an applicant to provide a copy of the clemency application to the judge and prosecuting attorney of the court that convicted him or her. The Clemency Board, although only comprised of the Governor and two Cabinet members, “will consider letters in support of, or opposition to, the grant of executive clemency” (emphasis added). *See* Information and Instructions on Applying for Restoration of Civil Rights.

16. FLA. STAT. § 940.05 reveals that ex-felons “*may* be entitled to restoration of all civil rights of citizenship” if they have “received a full pardon, served the maximum term of the sentence imposed, or been granted. . . final release by the Parole Commission” (emphasis added).

17. *See, e.g.,* Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project (1998), available at <http://www.hrw.org/reports98/vote/index>.; Patricia Allard and

mated population of ex-felons disenfranchised in Florida are African-American males. The national perspective is more of the same. An estimated 4.6 million Americans – roughly 1 in 50 adults – are barred from voting because of a felony conviction.¹⁸ American laws that bar ex-felons from exercising their voting franchise disproportionately affect minority communities nationwide as more than 1.4 million African-American men (13%) are disenfranchised – a rate almost seven times the national average of just over (2%) for all other adults.¹⁹ Given current rates of incarceration, 3 in 10 African-American men in the next generation will be disenfranchised at some point during their lifetimes.²⁰ As a result, Florida's population of disenfranchised ex-felons, who are also African-American males, more than doubles the already disproportionate national minority rate.

B. Beacham and Johnson – *Birds of a Feather*

In *Johnson*, the district court maintains that the plaintiffs' equal protection argument flew into the face of clear precedent established both by the United States Supreme Court and the sitting court.²¹ The Honorable James Lawrence King, District Judge, relied primarily upon the holding in *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.1969),²² which was set forth more than thirty years prior to the date of his ruling. Five months following the district court ruling in *Beacham*, the Supreme Court issued a *per curiam* opinion affirming the *Beacham* ruling.²³ With little variance of fact the *Johnson* and *Beacham* cases presented the judicial system with the age-old question of whether a state may constitutionally exclude from the franchise per-

Marc Maurer, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, The Sentencing Project (Jan. 2000).

18. Jeff Manza and Christopher Uggen, *The Political Consequences of Felon Disenfranchisement Laws in the United States*, 67 AM. SOC. REV., 2002, 777-803 (earlier version of paper presented at the annual meetings of the American Sociological Association, Washington, DC, Aug. 16, 2000), available at <http://www.sentencingproject.org/pdfs/UggenManza.pdf>.

19. *Id.*

20. Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(b)(1)(K) (2005), available at http://www.pfaw.org/pfaw/dfiles/file_493.pdf.

21. *Johnson*, 214 F. Supp. 2d at 1337-38.

22. The three-judge district court held that a "state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony" does not constitute denial of equal protection or due process "for the governor, with approval of three members of his cabinet, to restore discretionarily the right to vote to some felons and not to others." *Id.* at 184.

23. *Beacham v. Braterman*, 396 U.S. 12 (1969).

sons otherwise qualified to vote who have been convicted of a felony.²⁴ Notably, the *Beacham* court acknowledged the current absence of Supreme Court resolve on this "precise issue" and instead sought direction from a Second Circuit Court of Appeals case.²⁵ Due partially to the affirmation from the Supreme Court on the paramount question in *Beacham*, the *Johnson* court adopted its ruling as binding precedent.²⁶ With the added weight of *Johnson*, the tradition of felony disenfranchisement continued to gain momentum.

In New York, two years earlier than *Beacham*, the Second Circuit's reasoning in *Green* proved to be persuasive enough for the *Beacham* court to follow.²⁷ Despite the vast contrast between propriety and established law, Judge King, writing interpretatively of the *Beacham* holding, concludes the disenfranchisement provision of Florida's 1968 Constitution violates neither the Equal Protection Clause nor the Due Process Clause of the United States Constitution.²⁸ Hence, based on *Beacham*, foreclosure is made of the plaintiffs' due process claims by the judicial decree granting the defendant's motion for summary judgment without any dissent.²⁹ To be sure, the court went further in *Johnson* to validate Florida's disenfranchisement law as not enacted with racially discriminatory motives.³⁰ As will be underscored later, whether such law is predicated upon impermissible discriminatory intent is an evidentiary inquiry into "circumstantial and direct evidence of intent as may be available."³¹

C. Richardson Turns Propriety into Precedent

California's Supreme Court decided the issue of felony disenfranchisement to the contrary in a factually similar case involving three convicted felons who had completed their sentences and paroles.³² Thereafter, the Supreme Court granted certiorari and then reversed, remanding the prior ruling, to wit, that disenfranchisement of

24. *Beacham*, 300 F. Supp. at 183.

25. *Id.* at 184 (citing *Green v. Bd. of Elections of the City of New York*, 380 F.2d 445 (2nd Cir.1967), 389 U.S. 1048 (1968)).

26. *Johnson*, 214 F. Supp. 2d at 1337.

27. *See, Green*, 380 F.2d at 451 ("[T]he propriety of excluding felons has been so frequently recognized – indeed put forward by Justices to illustrate what the states may properly do – that such expressions may not be rejected as unconsidered dicta.").

28. *Johnson*, 214 F. Supp. 2d at 1337 (citing *Beacham*, 396 U.S. at 12).

29. *Id.* at 1333.

30. *Id.*

31. *Johnson*, 353 F.3d at 1294 (quoting *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

32. *See Ramirez v. Brown*, 9 Cal. 3d 199 (1973).

convicted felons who had completed their sentences and paroles did not deny equal protection.³³ However, not all of the Justices agreed with Justice Rehnquist's opinion. Two followed the dissenting Justice Marshall.³⁴ The *Johnson* court used the *Richardson* case to augment the strength of the *Beacham* decision in order to reach its conclusion that felony disenfranchisement law does not violate the Constitution, neither under equal protection nor due process claims.³⁵

Not until the *Richardson* decision was rendered had the Court given "plenary consideration" to the constitutional question presented by the *Johnson* plaintiffs.³⁶ Rather than rely on *res judicata*, which obviously could not be done, the Court instead recounts a couple of cases decided at the close of the 19th century that collectively comprise the framework for its ruling in *Richardson*.³⁷ The Court's formula for what it calls "settled historical and judicial understanding of the Fourteenth Amendment's effect of state laws disenfranchising convicted felons"³⁸ also includes its own dicta from an opinion upholding the imposition of North Carolina's literacy requirement for voting.³⁹ In addition to the *Beacham* holding, the *Richardson* court points to two district court cases which were summarily affirmed that attack state disenfranchisement laws targeted at convicted felons.⁴⁰ Finally, the Court points out that Section 2 of the Fourteenth Amendment affirmatively sanctions excluding felons from voting.⁴¹

Having considered the aforementioned cases, the United States Supreme Court in *Richardson* found the California Supreme Court erred by concluding that California may no longer, "consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from

33. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

34. *Id.* Justice Marshall, dissenting, states that this ruling allows a "State [to] strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment" and is grounded "on an unsound historical analysis which has already been rejected by this Court." *Id.* at 56.

35. *Johnson*, 214 F. Supp. 2d. at 1338.

36. *Richardson*, 418 U.S. at 53.

37. *Id. See*, *Marphy v. Ramsey*, 114 U.S. 15 (1885); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding disenfranchisement of bigamists and polygamists under [state] territorial laws). (*Overruled on other grounds by Romer v. Evans*, 517 U.S. 620 (1996)).

38. *Richardson*, 418 U.S. at 54.

39. *Id.* (citing *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959)).

40. *Id.* at 53 (citing *Fincher v. Scott*, 352 F. Supp. 117 (M.D.N.C. 1973), *aff'd*, 411 U.S. 961; *Beacham v. Brateman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12)).

41. *Richardson*, 418 U.S. at 54. This is the central assertion of dissenting Circuit Judge Kravitch in *Johnson*. He writes, citing *Richardson*, "[T]he text of the Fourteenth Amendment explicitly allows states to disenfranchise convicted felons. . .and the Supreme Court unambiguously has determined [disenfranchisement] is not an Equal Protection violation." *Johnson*, 353 F.3d at 1307.

the franchise convicted felons" who have paid their debts to society.⁴² As such, the decision was reversed, but also remanded for the California Supreme Court to address the respondents' (*Ramirez, et. al.*) alternative contention.⁴³ In addition to disagreement with the equal protection issue, Justice Marshall believed the Court was without proper jurisdiction.⁴⁴

D. Impermissible Discriminatory Intent?

Florida, Mississippi, and Alabama contain like disenfranchisement provisions whose original enactment birthdays are less than a quarter of a century apart in their respective state constitutions.⁴⁵ Only by overlooking the states of Nevada, Wyoming, and Indiana, as well as Kentucky and Virginia (southern states that are not truly considered "Deep South"), may the quick assumption be made that because the South seemingly preserved slavery longer than the North, to the point of the Civil War, therefore logic compels the conclusion that disenfranchisement laws are borne of the South. Despite deeply rooted Southern vestiges of *de jure* discrimination and segregation, the fact that minorities are and have been disenfranchised for years across the nation, even in the Midwest states, forecloses that hypothesis.

The plaintiffs in *Johnson* presented a plethora of historical evidence chronicling Florida's disenfranchisement scheme in support of their contention "that race was a substantial and motivating factor" and "that the policy was originally enacted in 1838 and reenacted in 1868 with the particular discriminatory purpose of keeping [B]lack from voting."⁴⁶ The appellate court considered a Supreme Court ruling that found Alabama's Constitutional disenfranchisement provision

42. *Richardson*, 418 U.S. at 56.

43. *Id.* Respondents averred a "total lack of uniformity in . . . election officials' enforcement of the disenfranchisement laws as to work a separate denial of equal protection." *Id.*

44. *Id.* at 63 (arguing, "I believe that the judgment of the California court was based on adequate and independent state grounds, I do not think we have jurisdiction to consider any other issues presented by this case").

45. FLA. CONST. art. VI § 4 (1838); MISS. CONST. art. XII, § 241 (1890); ALA. CONST. art. VIII, § 182 (1901).

46. *Johnson*, 353 F.3d at 1295 (referring to the evidence excluded in district court). Apparently, the Plaintiffs' evidence, an expert report and testimony from Dr. Jerome Shofner (one of Florida's leading historians of the Reconstruction era and publisher of two scholarly works analyzing the 1868 constitutional convention), was adequate enough that a "reasonable fact-finder *could*" ascertain a threshold showing. *Id.* at 1296-97 (emphasis added). Possibly because Dr. Shofner unequivocally concluded "that intentional racial discrimination had motivated the . . . criminal disenfranchisement provisions as passed in 1868." *Id.* at 1296. Interestingly, the appellate court, despite its tenor seemingly in favor of

was "motivated by racially discriminatory intent, [and] would not have been enacted . . . without the racially discriminatory intent, and therefore violated the Equal Protection Clause."⁴⁷ Albeit brief, the appellate court also considered a Mississippi case that addressed the issue of subsequent amendments and reenactments purging a racially motivated provision.⁴⁸

Accordingly, the Eleventh Circuit concluded that the plaintiffs' showing of racial animus and discriminatory intent behind the original 1868 felony disenfranchisement enactment is sufficient to create a genuine issue of material fact and satisfies their initial burden to prove an equal protection violation.⁴⁹ Furthermore, if such impermissible intent is found to exist, it continues through the 1968 enactment unless the State shows the provision would have been enacted with "an independent, non-discriminatory purpose."⁵⁰ In short, the State must then carry the burden of showing that it "knowingly and deliberately reenacted the provision for [a] non-discriminatory reason in order to prove [the] 1968 provision conformed to [the] Equal Protection Clause."⁵¹ Therefore, the appellate court found the district court's summary judgment ruling was improperly granted with respect to the equal protection claim.⁵²

The Eleventh Circuit in *Johnson* went so far as to recognize the obvious vestiges of impermissible racial discrimination that pervaded the enactment of Florida's 1868 disenfranchisement law. However, the 2004 appellate court balked at the opportunity to affirmatively declare that racial animus was a motivating factor behind the 1868 enactment. Opting rather to reverse the order on grounds that summary judgment

the Plaintiffs' equal protection violation claim, subsequently framed the holding with "if, then" language. *Id.* at 1287.

47. *Id.* at 1296-97; *Hunter v. Underwood*, 471 U.S. 222 (1985). In the district court, the Plaintiffs cited *Hunter* in support of their claim that felony disenfranchisement violates the Equal Protection Clause. *Johnson*, 214 F. Supp. 2d. at 1338.

48. *Johnson*, 353 F. 3d at 1300. (See *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (holding that "subsequent amendments and reenactments of a [disenfranchisement] provision removed discriminatory taint of original version adopted for purpose of discriminating against [B]lacks"). The district court in *Johnson* relied on this reasoning to conclude Florida's 1968 Constitution reenacting the felony disenfranchisement law "cleansed Florida[] . . . of any invidious discriminatory purpose that may have prompted its inception in Florida's 1868 Constitution." *Johnson*, 214 F. Supp. 2d. at 1339.

49. *Johnson*, 353 F.3d at 1301-02.

50. *Id.*

51. *Id.* at 1287. See also, *Hunter*, 471 U.S. at 227-28 (applying the approach set forth in *Arlington Heights*, see *supra* note 31).

52. *Id.* at 1302.

was improper, the question remains "whether such provision was reenacted in 1968 with independent, non-discriminatory intent."⁵³

III. THE JOHNSON CONJECTURE

Plaintiff Thomas Johnson along with five other African Americans, one Hispanic, and one Caucasian filed suit on behalf of all Floridians convicted of felonious crimes who have completed their terms of incarceration or probation, yet remain ineligible to vote based on state law.⁵⁴ Neither of the plaintiffs had successfully restored their civil rights to become eligible to vote in Florida at the time the litigation in this case commenced.⁵⁵ Upon completion of his own terms pursuant to a felony conviction in New York, Mr. Johnson, then fifty-one (51) years old, became executive director of a Christian organization in Gainesville, Florida devoted to assisting newly released offenders with residential needs.⁵⁶ The case came about before the Southern District court on challenge to Florida's disenfranchisement law, whereupon cross-motions for summary judgment were made and arguments heard in support of both motions.⁵⁷ District Court Judge James Lawrence King excluded certain expert testimony⁵⁸ en route to granting the defendants' motion for summary judgment with prejudice.⁵⁹ Plaintiffs, in turn, appealed.

Procedurally, the grant of summary judgment was reviewed *de novo* using identical legal standards as were applied by the district court.⁶⁰ The plaintiffs essentially claimed on appeal that the "intent of the 1868 framers remains operative" within Florida's disenfranchisement law in violation of the Equal Protection Clause.⁶¹ As previously

53. *Id.* at 1287.

54. *Johnson*, 214 F. Supp. 2d. at 1335.

55. *Id.* See *supra* note 14 for Florida statute regarding voter registration qualifications. See also FLA. STAT. § 940.05 (Restoration of civil rights).

56. *Id.*

57. *Id.* at 1334-35. Plaintiffs sued members of Florida's Clemency Board in their official capacity. *Johnson*, 353 F.3d at 1292.

58. See *supra* note 46 regarding Dr. Jerome Shofner. Judge King states that Plaintiffs "at most have presented evidence to suggest that Florida's felon disenfranchisement policies were racially motivated in 1868 . . . they have not presented any evidence that the legislature that enacted the felon disenfranchisement provision in 1968 did so to discriminate against African Americans." In brief, the judge asserts that the legislature "significantly deliberated and substantially revised" Florida's 1868 provision effectually cleansing it of any original taint.

59. *Johnson*, 214 F. Supp. 2d. at 1343-44.

60. *Johnson*, 353 F.3d at 1292.

61. *Id.* at 1293.

noted, the appellate court acknowledged the presence of disputed issues of fact to be settled on the equal protection and voting rights claim. Using the lower court's summary judgment record as a roadmap, the court opined, "[T]his case, however, fits neither the *Hunter* nor the *Richardson* model" because the 1868 constitutional convention "did not have the final word on the disenfranchisement provision . . . [n]or did the provision originate in 1968."⁶² Thus, the court was faced with a quandary of legal sorts and seemed unsure as to how to definitively decide the issue in light of the positions argued by both sides.

The plaintiffs asserted that because impermissible intent was a motivating factor in the 1868 enactment, the burden of proving that the later reenactment was predicated on "legitimate, non-discriminatory" grounds rests with the State.⁶³ The defendants retorted, claiming that the State bears no burden in this regard. Further, the State contended that "the original provision has no legal effect" due to the subsequent reenactment.⁶⁴ In addressing the arguments proffered by the litigants, the court analyzed a line of cases concerning the legality of race-neutral policies tending to maintain intentional racial discrimination in other arenas such as *de jure* segregation.⁶⁵ The findings of those cases are most favorable to the Plaintiffs because where discriminatory intent is demonstrated to have existed the State must "show the original taint has been purged."⁶⁶

The appellate rationale straddles the issue at best, but still manages to provide a sliver of hope, that familiar spark common to most revolutionary changes known to mankind. Central to the appellate reasoning and inapposite the district court's adherence to the narrow view that invidious discriminatory intent is cleansed by later reenactment of facially neutral provisions,⁶⁷ the principle set forth by the Fifth Circuit more than ten years before *Cotton* conjures up a more vivid picture of the realities of the human experience, in that "[a] law

62. *Id.* at 1297. On the one hand, applying *Hunter*, the provision violates the Equal Protection Clause, because the defendants have not established as a matter of law "that the constitutional convention would have passed the felon disenfranchisement provision in 1868 absent a racially impermissible purpose." In contrast, applying *Richardson*, the provision is not *per se* unconstitutional because there is no evidence "that racial considerations were discussed by the participants in the 1968 constitutional revision process." *Id.*

63. *Id.*

64. *Id.*

65. *Johnson*, 353 F.3d at 1297.

66. *Id.*

67. See *Johnson*, 214 F. Supp. 2d at 1339 (citing *Cotton*, 157 F.3d at 391), and note 46 comments, *supra*.

may be infected by discriminatory intent at any stage, including a later reenactment.”⁶⁸ To be sure, the appellate court in *Johnson*, makes the crystal even clearer that intervening circumstances, standing alone, are insufficient to break the causal chain thus eroding the poison of original impermissibility.⁶⁹

The divide between the sitting courts in *Johnson* is obvious by their respective holdings. The district court’s doubtless stance that Florida’s “disenfranchisement law was not enacted for racially discriminatory motives”⁷⁰ differs with the appellate conclusion that the defendants failed to show that the 1868 provision would have been enacted at that time absent the impermissible discriminatory intent.⁷¹ The split between courts is further widened by the stance each took on the amount and style of scrutiny given to the disenfranchisement provision by the 1968 Constitutional Revision Committee (CRC). Judge King’s determination at the district level was that “the record surrounding the reenactment of Florida’s felony disenfranchisement provision in 1968 clearly indicates that significant deliberations and substantive changes were made by the Florida legislature”⁷² Distinctively, the appellate court found the provision “remained substantively unchanged,” although there were “certain textual modifications” during the revision process.⁷³ Where the district court foreclosed the Plaintiffs’ equal protection claim, the Eleventh Circuit Appeals court in 2004 decided to leave the door ajar as to whether Florida’s longstanding disenfranchisement provision conforms to Constitutional man-

68. *Johnson*, 353 F.3d at 1295 (citing *McMillan v. Escambia County*, 638 F.2d 1239, 1246 (5th Cir. 1981)).

69. *Id.* at 1293 (noting that “proof of discriminatory intent behind a specific policy in the past creates an inference that the impermissible purpose continues into the present, despite the passage of time and even, in some instances, *intervening changes to the policy*”) (emphasis added). See also *Hunter*, 471 U.S. at 233 (observing that despite the contention that 80 years succeeding the original enactment had legitimated the provision, Alabama’s constitutional disenfranchisement law “was motivated by the desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270.”)

70. *Johnson*, 214 F. Supp. 2d. at 1333.

71. *Johnson*, 353 F.3d at 1301 (based on *de novo* review of the district court’s opinion).

72. *Johnson*, 214 F. Supp. 2d. at 1339.

73. *Johnson*, 353 F.3d at 1297 (concluding that the record supports only that a subcommittee “discussed” the provision, “no evidence of the substance of that discussion, nor that the CRC as whole or the legislature ever discussed the provision. . .one could equally conclude that the Subcommittee regarded the felon disenfranchisement [law] as a legacy of previous constitutions that did not need to be revisited in substance.” *Id.* at 1301-02).

dates.⁷⁴ Perhaps these conflicts which arose in *Johnson* are the impetus necessary to forge new laws in observance "that measured against the standards of . . . modern equal protection jurisprudence, the blanket disenfranchisement of ex-felons cannot stand."⁷⁵

IV. UNPAID DEBTS

In the first *Johnson* appellate decision, a panel comprised of one district and two circuit court judges specifically held that if impermissible discriminatory intent was a motivating factor behind the 1868 enactment of Florida's felon disenfranchisement provision, and such provision would not have been enacted at that time absent impermissible discriminatory intent, then Florida had the burden of showing that the State knowingly and deliberately reenacted the provision for a non-discriminatory reason, in order to prove that 1968 provision conformed to Equal Protection Clause.⁷⁶ What seems peculiar is the placement of the word "*if*" within this otherwise clear directive for the State. Apparently the judges did not wish to go so far as to proclaim definitively that the 1868 provision was poisoned with racial animus and, as such, the revised enactment of 1968 suffers from the same defect. Had they done so, the only reasonable conclusion would be that Florida's disenfranchisement law unconstitutionally violates the Equal Protection Clause. Despite all the evidence available to prove that disenfranchisement of convicted felons is rooted in racism,⁷⁷ it baffles the mind how Americans, particularly *some* policymakers, profess that once you "pay your debt to society," you may return to the community.⁷⁸ Obviously, no one thought it necessary to inform those con-

74. See *supra* note 46. The court's essential holding relative to the question of impermissible discriminatory intent uses conjecture, i.e. "*if, then,*" as a springboard.

75. *Richardson*, 418 U.S. at 86 (Marshall, J., dissenting).

76. *Johnson*, 353 F.3d at 1301. See comments in note 46, *supra*.

77. See *Richardson*, 418 U.S. at 56 and comments in note 46, *supra*. Plaintiffs' evidence also details the 1868 constitutional convention being controlled by Moderate Republicans opposed to Black suffrage. Congress required Florida, as a condition of readmission to the Union, to extend voting rights regardless of race, thus the convention took place. Once control was wrested from the Radical Republicans, the Moderates substituted numerous stringent suffrage provisions, namely, the scope of disenfranchisement from "infamous crimes to all felonies." Thereafter, a Moderate leader boasted that he had kept Florida from becoming "niggerized." *Johnson*, 353 F.3d at 1295-96.

78. See Mauer, *supra* note 1. *Author's note*: As a policymaker myself, I am keenly aware of the fact that not every Florida legislator embraces such antiquated notions of law that would exact the harshness of withholding a citizen's voting franchise. See also S. 132, 107th Reg. Sess. (Fla. 2005) (proposed bill creates the Citizens Empowerment Act allowing a convicted felon to the automatic right to register to vote "restored by operation of law," (1) year after completion and satisfaction of all sentences imposed). See also, the Count Every

victed of a felony in states like Florida that completion of all probation, parole, or terms of incarceration is insufficient for society to clear the debt. To put it bluntly, the mere fact that scores of citizens have been systematically shackled under laws that serve no real rehabilitative purpose, while being taught that our American democracy represents the model for global equality, is hypocritical at best.

A. *True Democracy*

As previously noted, Plaintiffs' evidence from expert witness, Dr. Shofner, was excluded by the district court, but considered on appeal in 2004.⁷⁹ Seemingly, the district court judge relied so heavily on precedent that he felt precluded from taking judicial notice of historical evidence from the Reconstruction era that "Florida refused to extend civil and political rights to [B]lacks immediately following the Civil War."⁸⁰ The district court was quite convinced that no racial discriminatory motive pervaded the original enactment of Florida's disenfranchisement law and the 2004 appellate court followed up with a hypothetical rather than an unambiguous pronouncement. The holdings of these cases taken together, implicate questions of morality and true democracy.

As Justice Thurgood Marshall notes, "[d]isenfranchisement for participation in crime, like durational residency requirements, was common at the time of the adoption of the Fourteenth Amendment. But 'constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.'"⁸¹ Given the right to vote

Vote Act of 2005, S. 450, 109th Cong. (2005) (introduced by Senators Hillary Rodham Clinton, Barbara Boxer, and John F. Kerry, proposing creation of the Civic Participation Act purposed under § 701(b)(2) "to restore fairness in the Federal election process by ensuring that ex-offenders who have fully served their sentences are not denied the right to vote.") In March 2005, the Nebraska Legislature repealed the lifetime ban on all felons and replaced it with a two-year post-sentence ban. *Felony Disenfranchisement Laws in the United States*, The Sentencing Project, March 2005.

79. See *Richardson*, 418 U.S. at 63.

80. *Johnson*, 353 F.3d at 1295. While slightly acknowledging the evidence proved racial animus behind the 1868 provision, Judge King's rationale for summary judgment on Plaintiffs' claim of intentional racial discrimination centered on "significant deliberation and substantive revision" of the provision. His conclusion that Plaintiffs failed to show racial intent behind the 1968 enactment lines up with the theory of cleansing (or "purging") by subsequent reenactments. See *Johnson*, 214 F. Supp. 2d. at 1340-41.

81. *Richardson*, 418 U.S. at 76 (Marshall, J., dissenting) (quoting *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972)) and arguing in favor of declaring disenfranchisement unconstitutional under the same premise as durational residency requirements held in *Dunn v. Blumstein*, 405 U.S. 330 (1972), "[t]here is no basis for concluding that Congress intended by Section 2 to freeze the meaning of other clauses of the

"is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," America has repeatedly recognized that voting, like free speech and expression, is a fundamental right.⁸² Public policy arguments favoring laws that eliminate fundamental civil rights are tenuous where true democratic values are balanced against longstanding constitutional principles such as taxation without representation. As Marc Mauer observes, there is no value in the largely retributive function of disenfranchisement nor does it serve the goals of incapacitation or deterrence because "[i]ndividuals who are not already deterred from crime by the threat of incarceration are unlikely to be swayed by the prospect of losing their vote."⁸³

To measure disenfranchisement under the requirements of Section 1 of the Equal Protection Clause, as Justice Marshall suggests, means to apply the compelling-state-interest test (balancing individual interests against state interests).⁸⁴ His point is eloquently spelled out that "[t]here is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are affected and changed by the decisions of government."⁸⁵ A true democracy is just as, if not more, concerned with making sure every citizen has a voice as it is with extracting retributive payments to society—payments that should be honored when remitted in full.

B. *An Equitable Approach*

Essentially *Johnson* came up through a vein of case law stacked against the Plaintiffs, who merely attempted to prove that Florida's law deprived their fundamental voting franchise. *Beacham* and *Richardson* collectively provided a means by which the Plaintiffs' equal protection and voting rights claims were sentenced to a "palace of [in]justice."⁸⁶ The *Cotton* holding was used to seal the door of the palace by making any racially discriminatory law subject to reincarnation once a superseding amendment is enacted.⁸⁷ Thus, *Hunter* became the

Fourteenth Amendment to the conception of voting rights prevalent at the time of the adoption of the Amendment.").

82. *Id.* at 77.

83. *See Mauer, supra* note 1, at 17.

84. *Richardson*, 418 U.S. at 77-78.

85. *Id.*

86. Rev. Dr. Martin Luther King, Jr., "I Have a Dream" Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963).

87. *Cotton*, 157 F.3d at 388.

only place within the palace for the Plaintiffs to hang their hat; even though *Hunter* generally supports the Plaintiffs' assertion for an equal protection violation, it is not exclusively on their side. The Court in *Hunter* remarks, "without deciding whether [the disenfranchisement provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against [B]lack[s] on account of race and. . . continues to this day to have that effect [therefore,] it violates equal protection under *Arlington Heights*."⁸⁸

Seemingly, the *Johnson* court in 2004 was acutely observant of the insurmountable weight of case law pressing down against the Plaintiffs' plight, even further exacerbated by the rejection of their expert testimony. It must have come to mind that a fair equal protection case must first begin with an equal chance to advance one's claim. As previously noted, the appellate court ruled that the Defendants failed to prove the original 1868 constitutional provision would have been enacted absent impermissible discriminatory intent.⁸⁹ Perhaps the phrasing of the holding, by their choosing the word "if," is indicative of the court being sympathetic to the legal precedence working against the Plaintiffs, the denial of relevant expert testimony, plus the failure to prove non-discriminatory intent by the Defendants. Surely equitable relief is proper where the legal remedy is insufficient to serve the interests of justice, thereby dismantling the vestiges of inequality that Florida's disenfranchisement law has perpetuated through racial discrimination since the 19th century. The Roman maxim is apropos, "[E]quity regards as done that which ought to have been done."

Interestingly, seven months after the appellate court's reversal of the district opinion, pursuant to a request by a member of the appellate court for a poll on the suggestion of a rehearing en banc, a majority of the judges granted the rehearing.⁹⁰ It is possible the court felt their decision made the previous December was improperly rendered on a material issue that could have changed the outcome; it is equally conceivable that the court realized they missed an opportunity to pro-

88. *Hunter*, 471 U.S. at 233. *But see Johnson*, 214 F. Supp. 2d. at 1333. Notably, *Johnson* and *Cotton* both interpreted the Supreme Court decision in *Hunter* as leaving open "the possibility that reenactment may be sufficient in some circumstances to 'break the causal chain'" *Johnson*, 353 F.3d at 1300-01 (citing *Knight v. Alabama*, 14 F.3d 1534, 1550 (11th Cir. 1994)). *Johnson* further states, "[But] we disagree with the Fifth Circuit's failure to consider whether such reenactment must be accompanied by an independent, non-discriminatory purpose." *Id.* at 1301.

89. *Johnson*, 353 F.3d at 1296.

90. *Johnson*, 377 F.3d 1163 (11th Cir. 2004) (vacating the previous panel's opinion).

nounce that Florida's felon disenfranchisement law does indeed violate the Equal Protection Clause.

Notwithstanding the apparent disagreement between the appellate and district courts in *Johnson* as noted above on the issue of whether impermissible discriminatory intent overshadowed the enactment of Florida's 1868 constitutional provision, the Eleventh Circuit has since ruled in April 2005 that "Florida's felon disenfranchisement provision is not a violation of the Equal Protection Clause under the standard the court adopted in *Hunter*."⁹¹ The court reasoned that the *Johnson* case is similar to *Cotton v. Fordice* in that the 1968 reenactment of Florida's felony disenfranchisement provision "eliminated any taint from the allegedly discriminatory 1868 provision."⁹²

V. CONCLUSION

It cannot be overstated that all of the cases addressing disenfranchisement have an effect upon one another in some fashion. The impact of the *Johnson* case, when taken in its entirety, is undoubtedly that voting is a fundamental right deserving legal protection, and that any infringement upon it must be accompanied by a compelling state interest devoid of impermissible racial intent. The time for serious deliberation has come for modern society to reflect upon the ideology and morality of true democracy. Although straining, the appellate court's reversal of *Johnson* in 2004 reminds America of her promises made to all citizens in the Fourteenth Amendment. As such, policymakers, legal experts and practitioners, and community leaders are becoming increasingly aware of the serious consequences of disenfranchisement upon the lives of their fellow citizens.

It is critical for modern America to send a consistent message at home and globally that the United States Constitution is grounded in equal protection for all its citizens. Perhaps the day is not too remote when Florida's jurisprudence, and that of the remaining states with felony disenfranchisement laws, will bring forth a change in treatment toward felony convicts who deserve to take full advantage of the chance to rehabilitate and integrate back into the fold of society. Specifically, for those felony convicts who have "paid their debt to society" by completing their terms of incarceration, parole or probation, more attention to honoring those mutual promises inherent within that phrase is at the forefront of political debate. If modern America and Florida

91. *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1224 (11th Cir. 2005).

92. *Id.* See *supra*, note 48.

policymakers choose to turn a blind eye to dismantling the vestiges of *de jure* disenfranchisement, then a mighty train will be permitted to barrel down the tracks wreaking havoc and shattering lives until either an equitable, moralistic stance is taken or until it finally just derails. Most assuredly, turning away in and of itself will lead to mass destruction. The Plaintiffs in *Johnson* all had the courage to renounce past criminal conduct and change their lives in reliance upon the promise of being reaccepted into the community—it is time for Florida to follow their example and have the courage to renounce disenfranchisement.
